IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 8TH DECEMBER 2006 / 17TH AGRAHAYANA 1928

WP(C).No. 31139 of 2006(F)

PETITIONER:

JOHARAMMA, AGED 47 YEARS,
W/O.ABDUL AZEEZ, CHIRAKKAD,
KUNNANUR AMSOM DESOM, PALAKKAD TALUK.

BY ADV. SRI.M.KRISHNAKUMAR
ADV.PRABHA R. MENON

RESPONDENTS:

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1. DHASTHANAGAR, AGED 50 YEARS,
S/O.HANEEFA RAWTHER, KALMANDAPAM,
KUNNATHUR AMSOM DESOM,
PALAKKAD TALUK.

2. THE SECRETARY,
PALAKKAD MUNICIPALITY,
PALAKKAD.

BY ADV. SRI.V.CHITAMBARESH

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 08/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

W.P.(C)NO.31139 OF 2006

DATED THIS THE 8th DAY OF DECEMBER, 2006

JUDGMENT

Petitioner is the plaintiff in O.S.6/05 on the file of Munsiff Court, Palakkad. Respondents are the defendants. Petitioner is challenging Ext.P5 order, passed by learned Munsiff, dismissing the application filed by petitioner to remit the report back to the Commissioner to file a further report with the assistance of building inspector. Learned Munsiff, after a detailed consideration of the contentions raised by petitioner, found that it is not necessary to remit the report back to the Commissioner as sought for. Ext.P5 order is challenged in this petition filed under Article 227 of Constitution of India.

2. Arguments of learned Counsel appearing for petitioner was that the report of the Commissioner is the most relevant evidence to be looked into by the Court to decide whether there is any violation of building rules and in such circumstances, the report should have been remitted back to the Commissioner as sought for, so that a further report could be filed with the assistance of the building inspector and Taluk Surveyor who are the competent authorities.

3. The crucial question is whether in exercise of the

extraordinary jurisdiction of this Court under Article 227 of Constitution of India, the order passed by the trial Court dismissing an application for remitting the report is to be interfered with. A Single Bench of this Court in **C.K.Venkateram Nayidu Vs. C.R.Vasanthi and others (AIR 2000 Kerala 27)** considering the question whether the interference is warranted in exercise of the supervisory powers under Article 227 of Constitution of India with regard to an order passed under Order XXVI Rule 1 held that the Court cannot interfere with the order as it is only a step in aid in the disposal of the suit and that order is only interlocutory in nature, in so far as the Court can at the final stage of the suit even do away with the report . Another single Bench in **A. Narayani Vs. Kittan @ Krishnan (1996(2) KLJ 489)** analyising the various decisions of various High Courts and Apex Court held that the trial Court would be in a better position to look into the report of the Commissioner as well as the plan and other attendant circumstances, including objections raised by parties and when the trial Court takes a decision that there is no necessity for remitting the commissioner's report, this Court under Article 227 of Constitution of India cannot re-weigh the evidence or interfere with that order.

4. Arguments of learned Counsel appearing for petitioner relying the Division Bench decision of this Court in **Kanaran Nair**

Vs. Madhavan Nair (1996(1) KLT 162 was that evenif Ext.P5 order is not interfered, Court may not shut out the right of the petitioner to apply for appointment of a Commissioner at a later stage and if the Court finds that it is necessary for a proper resolution of the dispute involved in the case, Court can appoint another Commissioner and therefore that right may be reserved. The Division Bench in **Kanaran Nair's** case held that the order is only interlocutory in nature and nothing contained in it would trammel the trial Court from taking a different view, if otherwise satisfied, at a subsequent stage. The Division Bench held :

> "The above discussion leads to the position that there is scope for raising contentions at all the subsequent stages for satisfying the court that the report of the commissioner cannot be relied on. The impugned order is only interlocutory in nature and nothing contained in it would trammel the trial court from taking a different view if otherwise satisfied at a subsequent stage. Parties are entitled to use other evidence including materials elicited through examination of the commissioners as a witness for satisfying of the court that findings in the report are faulty. Hence, from any angle the impugned order cannot be treated as having the potency to occasion failure of justice"

This petition is dismissed making it clear that at a later stage on the evidence if the Court finds that the report as such cannot be relied on, the Court can remit the report to the Commissioner to file a further report. Petitioner is also entitled to examine the

Commissioner if necessary.

M.SASIDHARAN NAMBIAR,JUDGE

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